

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

74-1887

Civil Appeal Case File No.

B
Pls
Written Argument
By Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

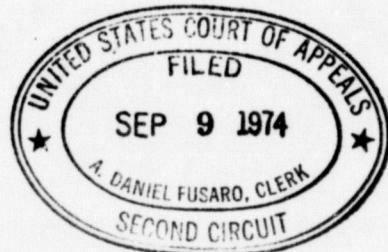
G. HINTON, Leaseholder,
Plaintiff-Appellant,
-against-

CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
73 Civ 4489 (CLM)

APPENDIX OF PLAINTIFF-APPELLANT

GRANVILLE HINTON
Plaintiff-Appellant,
Pro Se & Representative
c/o Jerome Meckler, Esquire
30 East 42nd Street
New York, New York, 10017
(212) MU. 2-3732



PAGINATION AS IN ORIGINAL COPY

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74-1887
-37
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GRANVILLE HINTON

VS

CONRAD SCHUBKEGEL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 73 cv 4489

JUDGE METZNER

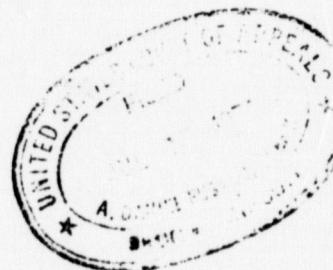
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UNITED STATES DISTRICT COURT

Jury demand date

7/3

by plaintiff on Jan-2-74.

Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

GRANVILLE HINTON, LEASEHOLDER

VS

CONRAD SCHUBKEGEL, INDIVIDUALLY, AND
EXECUTOR OF ESTATE OF KATARINA SCHERER

For plaintiff:

Granville Hinton
c/o Jerome Meckler
30 East 42nd St, NYC10017 MU-2-3732

For defendant:

Francis J. Coughlin
132 E. 85th St.
N.Y. 10028 SA-2-1483

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	6/17/74	Granville Hinton 15	15	
J.S. 6 mailed ✓	Marshal	7/17/74	Francis J. Coughlin 15	15	
Basis of Action: Negligence and damage to property; Breach of real property contract \$156,665.	Docket fee				
Action arose at:	Witness fees				
	Depositions				

THE CLERK OF THE COURT
United States District Court

20

/S CONRAD SCHUBKEGEL, ETC.

78

PROCEEDINGS

Da
Jude

-73 Filed complaint and issued summons.

-73 Filed application granting pltf. the issuance of a 30 day summons.

-73 Filed Summons and Marshal's return served on Conrad Schubkegel, by Granville Hinton dtd 10/26/73 - Conrad Schubkegel by Granville Hinton, dtd 10/25/73

Nov. 27-73 Filed for Deft. Notice of Motion to Dismiss for lack of Diversity etc. ~~returnable~~
RETURNABLE 12/13/73 Rm. 2201

Dec. 3-73 Filed pltfs. notice of demand for a more definite statement of particulars pursuant to Rule 12(e).

Dec-10-73 Filed plaintiff's application for adjournment and 20 days extension of time to respond motion to dismiss.

Dec-12-73 Filed affidavit of Francis J. Coughlin (for deft.) to request that the pending motion by deft. and ret. on 12-13-73, be expanded to a motion for summary judgment.

Dec-12-73 Filed defendants answer to demand for more definite statement.

Dec-13-73 Filed plaintiff's affidavit, and notice of motion to stay dismissal proceedings and for default of demands more definite statement. - ret. Jan-2-74 at 10 AM

Dec-26-73 Filed plaintiff's supplemental affidavit, re stay of dismissal proceedings.

Dec-27-73 Filed affidavit of Francis J. Coughlin (for deft.) in opposition to defts. motion to stay dismissal proceedings.

Jan- 2-74 Filed plaintiff's demand for a jury trial.

Jan- 2-74 Filed plaintiff's confirmation of submission without oral argument

Jan-11-74 Filed plaintiff's reply affidavit, in opposition to motion, Estoppel Counterclaim and expansion request for summary judgment

Apr-24-74 Filed OPINION #40630. . . . Upon deft's request, his motion to dismiss pursuant to Rule 12(b) will be treated as one for summary judgment under Rule 56. For reasons indicated, the motion for summary judgment is granted. So ordered. - Metzner, J. m/n

May- 3-74 Filed judgment and order that the defendant Conrad Schubkegel, individually and executor of Estate of Katarina Scherer, have judgment against the plaintiff Granville Hinton, Leaseholder, dismissing the complaint. -- Clerk. m/n

May- 6-74 Filed plaintiff's affidavit, and notice of motion to vacate opinion and for permission to file amended complaint. - ret. 5-28-74

May 23-74 Filed for Deft. Affidavit in Opposition to vacate the opinion dtd 4/24/74 which was entered 5/3/74

May-28-74 Filed affidavit of Granville Hinton in reply and for extension of time to serve brief on motion to vacate dismissal ruling ret. on 5-28-74

Jun- 3-74 Filed exhibits to affidavit of pltf. dtd. May 3, 1974

Jun- 6-74 Filed memo endorsed on pltf's motion filed 5-6-74: After reviewing the file in this case, the motion is denied. So ordered. - Metzner, J. m/n by pro-se clerk.

Jun-19-74 Filed plaintiff's affidavit, and request to extend time for 40 days to transmit record on appeal.

Jun-17-74 Filed pltf's notice of appeal to the USCA for the 2nd Circuit from judgment entered 4-24-74 and memo endorsed entered on 6-6-74 copy mailed to Francis J. Coughlin, Esq.

B

THE CLERK
JUDY F. METZNER, Clerk

3a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. _____

GRANVILLE HINTON

-v-

CONRAD SCHUBKEGEL, et al.

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 73-civ-4489

JUDGE METZNER

1st Supplemental Record.

INDEX TO THE SUPPLEMENTAL RECORD ON APPEAL

DOCUMENTS

Certified extract of docket entries

C.

Designation of exhibits to be transmitted to the U.S.A. with
supporting Affidavit of service by mail.

26.

Clerk's Certificate.

27.

EXHIBITS

See attached list.

EXHIBITS TO AFFIDAVIT
OF PLAINTIFF DATED MAY 3rd,
1974, IN SUPPORT OF MOTION
TO VACATE OPINION ORDER AND
FILE AMENDED COMPLAINT

INDEX Number	Document
" 1 "	Summons, complaint and returns
" 2 "	Motion and Affidavit to Dismiss Complaint and Action
" 3 "	Demand for a more definite Statement of particulars
" 3-a"	Demand for jury trial
" 4 "	Lease contract and paid receipts
" 5 "	Order granting amendment to individual name
" 6 "	Vacate order and Demolition Certificate of Bldg. Dept.
" 7 "	Affidavit of Kenneth Dubroff, Hospital rejecting lease
" 8 "	Deeds of Scherer and Mt. Sinai Hospital
" 9 "	Affidavit of DeRose.s attorney "leasehold contract unknown"
"10 "	Affidavit of Executor's attorney admitting lack of knowledge of accounting and whereabouts of deposit
"10-a"	SHERIFF'S "Missing-Not Found" Certificates on JOSEPH DEROSA
"11 "	N.Y. Supreme Court Orders showing timeliness of action on lease contract and lack of in personam jurisdiction
"12 "	<u>Amended Complaint for filing</u>

ATT: Clerk of the Court:

PLEASE DO NOT FILE THESE EXHIBITS, To be Returned
to counsel or plaintiff after hearing determination.

GRANVILLE HINTON
Plaintiff, pro se and
representative in fact
c/o Jerome Heckler, Esq.
30 East 42nd Street
New York, N.Y., 10017
Tel. MU. 2-3732

26

60

JUN 17 12 39 PM '74

S.D. OF N.Y. *45*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G. HINTON, Leaseholder,
Plaintiff-Appellant, :

File No. 73 Civ. 4489
Judge Metzner

-against- :

CONRAD SCHUBKEGEL, Individually, :
and Executor of Estate of
Katarina Scherer, :
Defendant-Appellee. :

NOTICE OF APPEAL

Pursuant to Rule 73(b)
Federal Rules of Civil
Procedure.

SIR:

PLEASE TAKE NOTICE that GRANVILLE HINTON, Plaintiff-Appellant in the above entitled action, appearing pro se and representative in fact under U.S.C. 28:1654 and FRCP Rule 17, feeling aggrieved and unduly deprived of property, Constitutional, procedural remedy and substantive rights, Herby Appeals to the United States Court of Appeals for the Second Circuit, From this District Court's Order and Judgment by Judge Charles M. Metzner dismissing the Complaint, entered April 24, 1974 and/ May 3, 1974 and Memo endorsed Order entered June 6, 1974 denying Motion to open judgment and file amended complaint.

That appeal is solely from the said judgment orders' ruling parts dismissing the complaint, and denying the motion for vacatur and amendment.

Dated: New York, New York
June 17, 1974.

Yours, etc.,

Granville Hinton

GRANVILLE HINTON
Plaintiff-Appellant, pro se
and representative in fact
c/o Jerome Meckler, Esquire
30 East 42nd Street
New York, New York, 10017
Tel. MU. 2-3732

TO:

FRANCIS J. COUGHLIN, Esq.
Attorney for Defendant-
Appellee Conrad Schubkegel
132 East 85th St., NYC 10028

The Clerk of the Court
United States District Court
Southern District of New York
Foley Square, New York, 10007

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7a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4489

G. HINTON, Leaseholder,

Plaintiff :

-against-

73 Civ. 4489

CONRAD SCHUBKEGEL, Individually
and Executor of Estate of
Katarina Scherer,

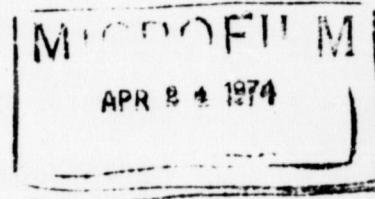
Defendant :

METZNER, D. J.:

Defendant has moved to dismiss this action
pursuant to Rule 12(b) of the Federal Rules of Civil
Procedure and, upon his request, the motion will be
treated as one for summary judgment under Rule 56.

Plaintiff has moved pursuant to Rule 12(e) for
a more definite statement concerning the motion to dismiss.
As Rule 12(e) concerns pleadings and not motions, plain-
tiff's motion is denied. Plaintiff's motion to stay
the determination of defendant's motion is also denied.

The complaint filed by the pro se plaintiff
alleges that a three-year lease agreement was entered



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into on or about February 15, 1961 between one Katarina Scherer and plaintiff whereby plaintiff rented a store and an adjoining apartment at 1292 Park Avenue in New York City. The lease is claimed to have had an automatic yearly extension option. At the expiration of the three-year term plaintiff stayed on as a tenant. In a similar action brought by this plaintiff in this court and based on the same facts, Judge Tyler found that plaintiff became a month-to-month tenant when the original lease expired. Hinton v. Derosa, 73 Civ. 3069 (S.D.N.Y., November 5, 1973).

The lessor died on December 20, 1965 and the property in question was devised to Susan Derosa, Joseph Derosa and Patricia Derosa. The defendant in this action is the executor of the original lessor's estate. In January 1969 the building was sold to Mount Sinai Hospital. Plaintiff remained in possession of his leasehold until July 1970 when, because a fire had made the premises uninhabitable, he was ordered by the fire department to vacate.

The first claim in the complaint appears to be that the defendant sold the leasehold without prior due

notice to plaintiff, causing plaintiff to lose the right to purchase the building himself.

In addition, plaintiff appears to claim that defendant's negligence caused the fire at the leased premises resulting in extensive injuries to plaintiff and loss of the use of his store and residence. He seeks damages of \$156,665.00.

The motion for summary judgment must be granted.

It should first be noted that this court has jurisdiction of this action under 28 U.S.C. § 1332 (1970) since plaintiff is a citizen of New York and defendant is a citizen of California. Defendant has asserted that, as executor of a New York estate, he is considered a citizen of New York for the purposes of this action. The statutes cited in support of this claim, N.Y. C.P.L.R. §§ 302, 313 (McKinney 1972), and N.Y. Surr. Ct. Pro. Act § 703 (McKinney 1967), at best serve only to give the court personal jurisdiction over defendant. They do not make him a citizen of this state so as to defeat diversity jurisdiction. See Buchheit v. United Air Lines, Inc., 202 F. Supp. 811 (S.D.N.Y. 1962).

The negligence claims set forth in the complaint are clearly barred by the three-year statute of limitations applicable in this diversity action under Section 214 of the New York Civil Practice Law and Rules.

As to the claim that plaintiff should have received "due process of law notice" as to the "prejudicial sale" of the building in question, plaintiff offers no support for his claim that he was entitled to notice. Indeed, such notice is not required. Cf. N.Y. Real Prop. Law § 248 (McKinney 1968). In any event, defendant in this action could not be liable for any failure of notice since title rested with the Derosas at the time of the sale. See, Waxson Realty Corp. v. Rothschild, 255 N.Y. 332, 174 N.E. 700 (1931); Corley v. McElmeel, 149 N.Y. 228 (1896).

It appears that any other claims which might be set forth in the complaint in this case have been dealt with adversely to plaintiff in one of his four previously filed cases in the state and federal courts.

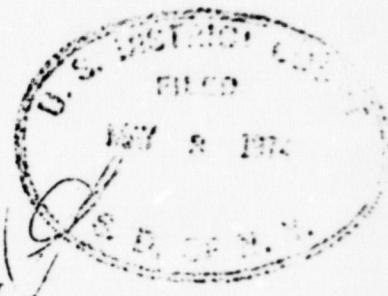
The motion for summary judgment is granted.

So ordered.

Dated: New York, N. Y.
April 23, 1974

Charles M. McBrearty
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



GRANVILLE HINTON, Leaseholder

JUDGMENT

-against-

Plaintiff

73 Civil 4489 (CM)

CONRAD SCHUBIGEL, Individually and
Executor of Estate of KATARINA SCHERER

Defendant

The defendant having moved the Court pursuant to Rule 12(b) and upon
his request the Court treated the motion as one for summary judgment,
pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the
Court thereafter on April 24, 1974, having handed down its opinion granting
the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendant CONRAD SCHUBIGEL,
individually and Executor of Estate of Katarina Scherer, have judgment
against the plaintiff GRANVILLE HINTON, Leaseholder, dismissing the
complaint.

Dated: New York, N.Y.
May 3, 1974

Raymond J. Burghalt
Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Courthouse,
Foley Square
New York, N.Y. 10007

Date 6-27-74

G. Hinton
% Jerome Meckler, Esq.
30 E. 42 St.
NY, NY 10017

Title: Hinton --- Schubkegel

Docket Number: 73 Civ 4489

Decision dated: 6-5-74

Judge Metzner

Sir:

There is enclosed herewith, copy of decision
filed and entered in the above-entitled proceeding.

Very truly yours,

RAYMOND F. BURGHARDT
Clerk

Francis J. Coughlin Esq.
132 East 85th St.
NY, N.Y.

By: Grace Di Giorgio
Deputy Pro Se Clerk

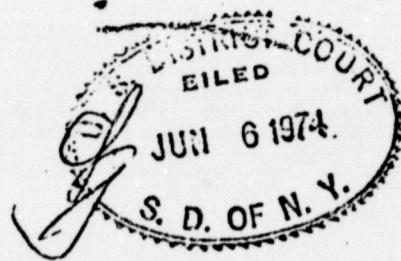
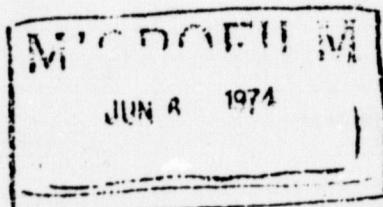
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13a

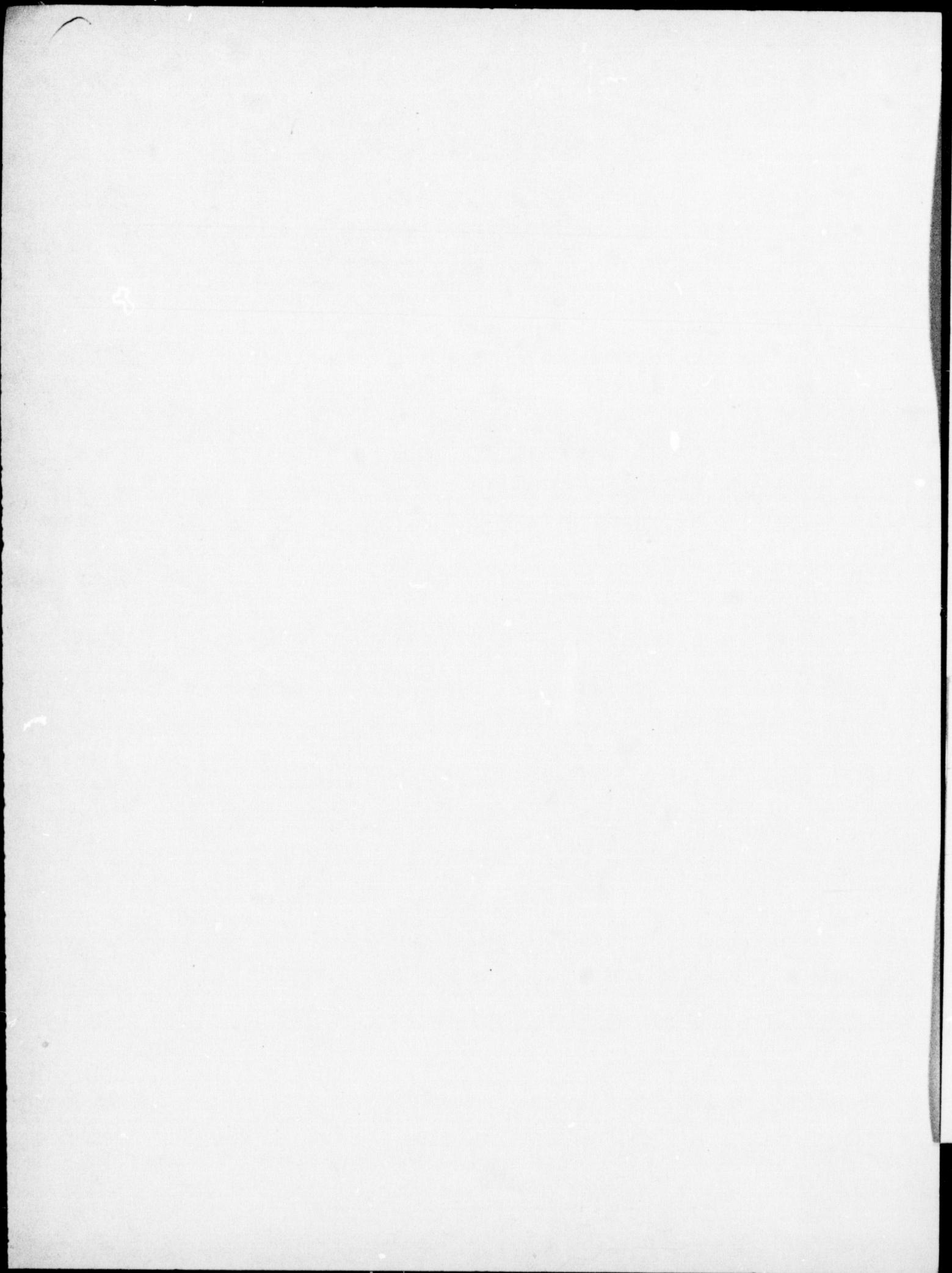
June 5, 1974 After reviewing
the file in this case
this motion is denied
So ordered

Charles H. Netzer

U.S. D.J.



14a



SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART II

G. HINTON,

Plaintiff,

-against-

CONRAD SCHUBKEGEL, Individually &
Executor, Estate of Katarina Scherer,

Defendants.

: Index No. 6315/72

BSD

BIRDIE AMSTERDAM, J.:

Plaintiff's motion to dismiss the answer which defendant Schubkegel has interposed to plaintiff's claim for recovery of a security deposit is denied. The answer was timely because it was served no more than 10 days after service of notice of entry of the court order which dismissed all of plaintiff's claims with the exception of the instant claim for the security deposit. The doctrine of res judicata does not bar defendant's answer, since the court has not previously determined the merits of the allegations constituting the answer. The defenses set forth in the answer are prima facie legally sufficient and the papers fail to demonstrate that these defenses are lacking in merit. Defendant's cross-motion to dismiss plaintiff's cause of action seeking recovery of the security deposit is denied. Since the prior order of the court determined that this cause of action was not barred by the Statute of Limitations, the doctrine of res judicata bars a reconsideration of the timeliness of the cause of action. Furthermore, the papers including the copy of a purported release which plaintiff has submitted, raise a triable issue as to the scope of the release allegedly given by plaintiff to Mount Sinai Hospital in return for the monies which defendant Schubkegel contends were in payment of plaintiff's claims against the defendants named in this action.

Dated: December 9th, 1973.

FILED

B. Becker, Clerk
J. S. C.

DEC 5 1973

NEW YORK
COUNTY CLERK'S OFFICE

County Clerk's No. 6 515, 19 22,

Spec I Liber. 1182 Line 9, 19 73

EXHIBIT "11" Record 26 15a

New York Supreme Court
County of New York

Hinton

— against —

SCHURHEOC

The following papers numbered 1 to
read on this motion.....
this day of 19

Notice of Motion and Affidavits Annexed.....

Order to Show Cause and Affidavits Annexed.....

Answering Affidavits.....

Replying Affidavits.....

Filed Papers (County Clerk's Office)

Notice of Examination and Pleadings.....

Exhibits.....

Copies Papers.....

Referee's Report.....

Stenographer's Minutes.....

Stipulation.....

PRESENT: BIRDIE AMSTERDAM

HON.

OB
Justice.

62
LJ

PAPER NUMBER.....

1

2

3

4

5

6

7

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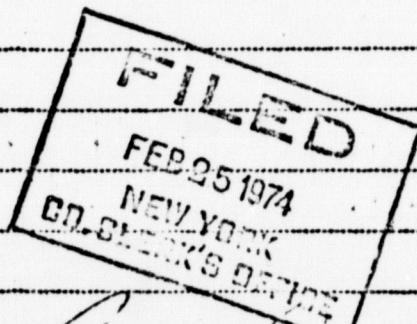
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Upon the foregoing papers this
Plaintiff's motion is granted only to the extent of allowing
paragraphs 3, 4, and 5 of the affirmation in opposition to be a sufficient
response to the particulars demanded.

In all other respects the motion is denied.

Any further motions shall be made only at the trial of this action



February 24, 1974

J. S. C.
J. S. C. 16a

Plaintiff's..... Defendant's..... Plaintiff's..... Defendant's..... Plaintiff's..... Defendant's.....

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SUPREME COURT: NEW YORK COUNTY

G. HINTON,

Index No. 6315-1972

Plaintiff

AFFIRMATION IN
OPPOSITION

-against-

CONRAD SCHUBKEGEL, individually
and Executor of Estate of
KATARINA SCHERER

Defendants

:

STATE OF NEW YORK
COUNTY OF NEW YORK

FRANCIS J. COUGHLIN, affirms and says:

1. That he is the attorney for the defendants
and fully familiar with all of the proceedings and pleadings
had to date herein.

2. That this affirmation is made in opposition
to plaintiff's motion for a more definite statement of
particulars. Once again, we are being treated to the
practice of law as seen by the plaintiff, G. HINTON.
No request for the information was served upon the defendants.

3. In answer to the three "particulars" this would
be within the purview of the plaintiff, Defendant,
CONRAD SCHUBKEGEL would not have a copy of the release.
On information and belief, the plaintiff executed a release
to MT. SINAI HOSPITAL, his landlord, sometime in 1970, and
received a considerable amount of money for the release.

4. Same response for "2", defendant, SCHUBKEGEL
does not have a copy of the release.

5. On "3" this should be a question directed
to the landlord at the time of the transfer to MT. SINAI
HOSPITAL. The building was sold by SUSAN DE ROSE, JOSEPH DE ROSE

-1-26

EXHIBIT "10"

17a

and PATRICIA DE ROSE to MT. SINAI HOSPITAL. Neither CONRAD SCHUBKEGEL nor the estate of KATARINA SCHERER were party to that transaction. Defendants would have no records indicating what transpired at the closing.

6. Again the paper war conducted by the plaintiff continues. While this motion is pending the plaintiff is preparing an appeal of the prior Court's ruling. There are motions pending in the Federal Court and the plaintiff has already indicated that he intends to file an appeal in the Federal Court. This latest brazen harassment of the parties in asking for the information which the plaintiff knows is not within the possession of the defendant, is just a further example of what he has plagued all the parties in this action.

7. It is respectfully requested that this Court grant the relief that was necessary in the Federal Court by Judge LASKER, copy of the letter is attached. The Court should restrain the plaintiff from filing any further papers unless the Court grants permission.

8. The current leave requested by the plaintiff should be denied.

9. Your deponent affirms under penalty of perjury that the foregoing statements are true.

Dated: New York, N.Y.
February 3, 1974

FRANCIS J. COUGHLIN

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART II

G. HINTON,

Index No. 6315/1972

Plaintiff, : NOTICE OF MOTION
-against- : FOR A MORE DEFINITE
CONRAD SCHUBMEGEL, Individually & : STATEMENT OF
Executor, Estate of Katarina Scherer, : PARTICULARS

Defendants. :

-----X

Upon the Affidavit of GRANVILLE HINTON, sworn to on the 31st day of January, 1974, and Decision of Hon. Justice Amsterdam dated May 21st, 1973 sustaining the timeliness of the Action and demand for due return of lease security deposit, the Summons and Verified Amended Complaint filed December 21st, 1972, and the Unverified Answer dated October 16th, 1973, and Exhibits of Plaintiff, the Undersigned will move this Court at a Special I.C. Part II thereof, At the CourtHouse, Room 418, No. 60 Centre Street, City, County and State of New York, On the 13th day of February, 1974, At 9:30 A.M. or as soon thereafter as Counsel or Plaintiff can be heard, for an Order pursuant to Rules 3042 and 3013, CPLR, directing the Defendants to deliver to Plaintiff a More Definite Statement of Particulars (Verified) within Ten Days after service with notice of entry thereof, On the Grounds:

1. The Action is for recovery of a long overdue \$65.00 Deposit on a Lease Contract for faithful performance and return thereupon. Plaintiff has duly performed all requirements on his part to be performed, Defendants defaulted demanded repayment, in violation of General Obligation Law, Sections 7-103 and 7-105).
2. That Issue joined herein on October 16th, 1973.
3. That certain affirmative defenses are too vague, ambiguous, confusing and redundant to afford a reasonable basis

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1972

on which to frame a belief, intelligent and logical response, and fail to comply with requirements of Rule 3013, CPLR).

4. That clear presentation of the particulars requested is material and necessary for proper prosecution of plaintiff's causes of action and preparation for trial.

5. That the following matters placed in issue by the pleadings herein are requested to be set forth in particular detail:

(1) State, specify whether the deposit repayment by Mt. Sinai Hospital alleged in paragraph "SIXTH" of the Answer was received for in writing by plaintiff. State date and time same was executed, and set forth a true and complete copy thereof.

(2) Whether the release executed by plaintiff alleged in paragraphs "SEVENTH" and "EIGHTH" of the Answer contained the names of Conrad Schubkegel and Estate of Katarina Scherer as releasees, and whether a clause therein limited release solely to Mt. Sinai Hospital, without prejudice of any claims of plaintiff against all former owners and their estates. Set forth a true and complete copy thereof.

(3) State, specify the names and addresses of the persons having custody of the Lease security deposit, cancelled check or receipt record or purported transfer if any to Mt. Sinai Hospital, date, time and manner, and how by reason thereof were the defendants herein released from the demanded repayment to plaintiff. Set forth true and complete copies thereof.

And, for such, other, and further relief as may be deemed just and proper.

Dated: New York, New York
January 31st, 1974.

Yours, etc.,

Granville Hinton
GRANVILLE HINTON
Plaintiff, Pro Se
c/o Jerome Meckler, Esquire
30 East 42nd Street
New York, New York, 10017

TO:

FRANCIS J. COUGHLIN, Esquire
Attorney for Defendants
Conrad Schubkegel and
Estate of Katarina Scherer
132 East 85th Street
New York, New York, 10028

Notes³ Found
P. 3

II-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
M. P. Church, and G. Hinton, Lessee, :
Store & Apt. 1292 Park Ave., N.Y., N.Y., :
Plaintiffs, :
-against- : 1082 Civ. 1970

Owner Lessor Katarina Scherer Estate :
1257-1292 Park Ave., N.Y., N.Y.) :
Conrad Schubkogel, Executor) :
Susan S. DeRose, Jos. DeRose, Patricia DeRosa :
Heirs 1292 Park Ave.) "John Doe", "Mary Doe", :
Successors, Assigns, Managing Agents, :
Custodians, Individually, Jointly, Severally, :
AFFIDAVIT IN :
SUPPORT OF MOTION :
TO DISMISS FOR :
LACK OF SUBJECT :
MATTER JURISDICTION :
FOR A MORE DETAILED :
STATEMENT, AND TO :
STRIKE.

Defendants. :
----- x

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS J. HEALY, JR., being duly sworn, deposes
and says:

I am a member of the firm of Healy & Baillie,
attorneys for Defendants Susan DeRose, Patricia DeRose and Joseph
DeRose, whose surnames are incorrectly spelled "DeRosa" in the
caption of the Complaint. I make this Affidavit in support of
said Defendants' motion for relief under Rules 11 and 12 of
the Federal Rules of Civil Procedure.

I - Motion to Dismiss for
Lack of Subject Matter
Jurisdiction Under
Rule 12(b)

The Complaint alleges Federal jurisdiction founded
on the grounds of Federal question and diversity. With respect
to Federal question jurisdiction, the facts alleged do not appear

in any way to involve Federal rights or statutes. Rather, if causes of action can at all be made out from the rather disorganized allegations in the Complaint, such causes of action would appear to involve Plaintiffs' rights under a leasehold agreement and an option agreement. As such, it would patently involve the laws of the City and State of New York and not present any Federal question.

The Complaint joins as Defendants "Jon Doe" and "Mary Doe", the alleged "Successors, Assigns, Managing Agents, Custodians, Individually, Jointly, Severally." The fact is that the "Successors" to the property in question is Mt. Sinai Hospital, which took title to the premises in all about the month of February, 1969. It is also a fact that the "Managing Agents" are Ginsburg Bros., 1690 Third Avenue, New York, N. Y. To the best of deponent's knowledge, information and belief both Mt. Sinai Hospital and Ginsburg Bros. are corporations having their principal place of business in New York, and therefore are "citizens" of New York within the meaning of 28 U.S.C., Section 1332. Accordingly, there is not the complete diversity between the parties plaintiff and the parties defendant required to sustain Federal diversity jurisdiction.

II - Motion to Strike Complaint
for Failure to have it
Signed by an Attorney

The Complaint alleges (at Paragraph SECOND) that Plaintiff Missioners Parent Church is a domestic, religious corporation. To the best of deponent's knowledge, information and belief this allegation is correct. Accordingly, said Plaintiff should have appeared by an attorney and an attorney should have signed the Complaint. In fact, however, the Complaint has not been signed at all (although it has been verified by Plaintiff G. Hinton) and therefore the Complaint should be struck pursuant to Rule 11 of the Federal Rules of Civil Procedure.

III - Motion for a More
Definite Statement

Deponent appreciates that the Complaint was not framed by an attorney, and that at least in the case of Plaintiff G. Hinton appearance by an attorney is not required. However, even making allowances for the fact that the Complaint was drawn without benefit of counsel, and the liberality of the Federal pleading rules, the allegations in the Complaint are to a large part so wild, ambiguous and irrelevant that it is impossible to answer them.

Thus, in Paragraph SECOND Plaintiffs allege a "Leasehold Agreement" between Plaintiff Missioners Parent Church and Defendant Katarina Scherer, the former owner of the premises at 1292 Park Avenue. It appears that most, if not all, of Plaintiff's asserted rights flow from the alleged "Leasehold Agreement." However, Plaintiffs do not state whether the alleged Leasehold Agreement was in writing, nor do they allege the term thereof. Both of these facts are critical to Defendants, since if an oral lease is alleged Defendants can plead as an affirmative defense the statute of frauds and, depending on the term of the lease, Defendants may be able to allege an affirmative defense of time bar. It is particularly appropriate for Plaintiffs to allege these pertinent facts, as the alleged Landlady on the lease (Katarina Scherer) has been deceased since 1965 and to the best of Deponent's knowledge, information and belief no written lease involving Plaintiffs, or either of them, has been found among her possessions.

Again, with respect to Paragraph SECOND of the Complaint, Plaintiffs allege that Defendants did nothing to perform something called the "compliance work." Defendants cannot determine whether the alleged obligation to do "compliance work"

is asserted to be an obligation under the Leasehold Agreement or under some separate agreement. Plaintiffs should be made to state the basis of the alleged obligation on the part of Defendants.

Paragraph FOURTH of the Complaint charges that Defendants failed to furnish Plaintiffs, and "staff workers", with any "bona fide, Adult guard protective, criminal, apprehension services" and seems to imply that as a result assaults and burglaries took place. Again, Plaintiffs failed to allege under what agreement such an obligation is supposed to have arisen and, moreover, Plaintiffs failed to specify what damages, if any, are alleged to have resulted from a breach of such obligation.

In Paragraph SIXTH Plaintiff alleges that Katarina Scherer gave "Plaintiff" a so-called "prior option right" to purchase for \$50,000 the "building property", which presumably means the premises at 1292 Park Avenue. As in the case of the alleged "Leasehold Agreement", Plaintiff failed to state whether such option was in writing or such term thereof. Moreover, it was not even alleged whether Plaintiff decided to exercise the option and Defendants simply are not in a position to state whatever affirmative defenses might be available to them. Clearly, Plaintiffs ought to state with particularity the terms of the alleged option and its exercise, if any.

The caption of the Complaint shows two Plaintiffs, Missioners Parent Church and G. Hinton. However, throughout the body of the Complaint the term "Plaintiff" is singular. It is therefore not clear whether the references in the Complaint to "Plaintiff" are to the Missioners Parent Church or G. Hinton, or both. Plaintiff should be made to clarify which Plaintiff is

referred to in each of the Paragraphs of the Complaint.

IV - Motion to Strike Redundant
and Immaterial Allegations

At page 5 of the Complaint, there are ten subparagraphs describing Plaintiff G. Hinton's personal qualifications, awards and achievements. It is submitted that these allegations are wholly irrelevant and in the interest of simplifying the joinder of issue these allegations ought to be struck from the Complaint. Similarly, at page 6 of the Complaint, subparagraphs "2" through "4" allege losses to, variously, staff executives, employees and the Government. In particular, it is alleged that some 16,000 employees (incorrectly spelled employer) lost a total of \$32,000,000 wages, and that the Government lost \$4,800,000 in taxes. None of these persons are parties to the Complaint and it appears that Plaintiffs do not claim to have suffered these losses themselves. Accordingly, the alleged losses of extraneous persons are wholly irrelevant and immaterial and should be struck from the Complaint.

WHEREFORE, Deponent prays for an order

1. dismissing the Complaint for lack of subject matter jurisdiction,

2. dismissing the Complaint of Plaintiff Missioners Parent Church for failure to have it signed by an attorney,

3. if the Complaint is not dismissed in its entirety, then having more definite statement as particularized in the notice of motion,

4. if the Complaint is not dismissed in its entirety, then to strike from the Complaint the allegations particularized in the notice of motion,

5. other, further and different relief as may
be just in the premises.

NICHOLAS J. HALEY, JR.

Sworn to before me this 10th
day of April, 1970.

MARY T. McDERMOTT
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-2611151
Qualified in New York County
Commission Expires March 3, 1971

*DeRosa's
Denial of
Mgt. Gr.
Knowledge
P.P. 2-4*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

-----x
G. HINTON,

Plaintiff, : Index #6315/1972

-against-

Conrad Schubkegel, Individual, and
Executor,

: AFFIDAVIT

Estate Katarina Scherer, Owner Leasor,
Susan S. DeRosa, Joseph DeRosa,
Patricia DeRosa, Owner Successors,
Representative, Individually, Jointly,
Severally,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

JACK A. GREENBAUM, being duly sworn, deposes and says:

1. I am associated with the firm of Healy & Baillie, attorneys for the three DeRose defendants (above misspelled as DeRosa). I am familiar with the prior proceedings herein and make this affidavit in support of the DeRoses' motion pursuant to CPLR §3103 for a protective order and pursuant to CPLR §§ 3211 and 3212 for summary judgment in favor of the DeRoses and against the plaintiff on the grounds: (1) Service upon the DeRoses was not properly effected; (2) the complaint fails to state a cause of action against the DeRoses; (3) the plaintiff does not have standing or capacity to sue herein; (4) the plaintiff should be estopped from maintaining this action by reason of gross and prejudicial laches; and (5) any cause of action which might exist is barred by the running ^{of} the applicable statute of limitations.

2. Mrs. Susan DeRose received copies of the summons and pro se complaint in this matter in or about March 1972, in the mail at her home in Harbor City, California. The complaint and affidavits of service filed herein are annexed as Exhibit "A". Although this may have been an attempt on the part of the plaintiff to comply with the provisions of CPLR §308(2) or (4),

EXHIBIT "A"

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service on Mrs. DeRose was patently defective. Effecting service on Mrs. DeRoses' children also has not been made.

3. On May 4, 1972, the DeRoses answered the complaint, stating the defenses asserted herein. A copy of the Answer is annexed as Exhibit "B".

4. The complaint apparently alleges an action to recover rents paid over a nine year period for a "store and two room apartment", under the authority of Multiple Dwelling Law §302, which bars a landlord's suit to recover rents where a multiple dwelling is not possessed of a Certificate of Occupancy as required for some buildings by M.D.L. §301. The DeRoses were the devisees of the subject property under the Will of Katarina Scherer, who died on December 20, 1965. The property was sold to Mount Sinai Hospital on or about January 4, 1969. The claim asserted against the DeRoses appears to be only for rent paid during the period of their ownership of the building.

5. On May 11, 1972, deponent received plaintiff's Order to Show Cause, returnable on May 19th, apparently directed against the motion by the attorney for the Estate to dismiss the complaint for lack of personal jurisdiction and time bar, returnable May 24th.

ff //

6. On May 11th, deponent received plaintiff's Notice to take the deposition of all the defendants on May 22nd. As to this Notice, the DeRoses respectfully request a protective order denying any oral examination of the DeRoses on the grounds that the subject property was managed by the Executor, who is the only one with knowledge thereof until the sale, and that the amount of money demanded does not warrant the expense of a deposition on oral questions of these defendants.

7. The building in question was erected in the year 1895, according to information afforded deponent by the Department of Buildings. Thus, the tenement is not subject to the

requirements of M.D.L. §301 and there was no bar to the collection of rents under M.D.L. §302.

Even if M.D.L. §302 were applicable, that statute is in derogation of the common law in barring the collection of rents and should be and has been narrowly construed as not to create a cause of action to recover rents paid. See Wokal v Semin 167 Misc. 463, 465, 4 N.Y.S. 2nd §6, 88 and other cases cited in the accompanying memorandum of law.

Further, if Section 302 were considered to apply and were construed to create a cause of action, the statutory limitations period of three years for actions to recover upon a liability, penalty or forfeiture created or imposed by statute, CPLR §214(2), would have expired in January 1972, barring the present action.

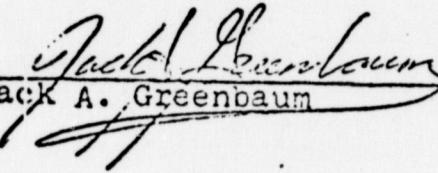
8. The original three-year lease is not available to deponent. However deponent is informed that the rent was paid not by the plaintiff, but by The Missioner's Parent Church, which would be the only entity with standing to seek the recovery of the rents. As an incorporated body, the Church may only appear by an attorney, under the authority of CPLR §321 (a).

9. The Missioner's Parent Church enjoyed the use and possession of the subject property for over nine years with full knowledge of whatever facts Mr. Hinton is relying upon in this proceeding. The Church, or Mr. Hinton, operated domestic service and employment businesses at that site which Mr. Hinton has in the past alleged to have been highly profitable. It is apparent that the plaintiff can show no damages consequent upon any alleged breach of duty owed him during the Church's period of possession and certainly should not be permitted to have the profitable use of the property for nine years and then be allowed to recover all or any part of the rents paid.

10. If Mr. Hinton is requesting the return of a security deposit from the DeRoses, this cause of action should

be dismissed as well. All rent security was credited to the purchaser ~~on~~ the sale of the property. The Church retained possession of the store until July 1969 when ordered to vacate after a fire. Any claim for the return of security is against the last owner of the building, or/perhaps a personal debt of the original lessor, but is not an obligation of the DeRoses.

WHEREFORE, it is respectfully requested that a protective order be issued denying the oral examination of the DeRoses or alternatively that summary judgment be granted in favor of the DeRose defendants and against the plaintiff.



Jack A. Greenbaum

Sworn to before me this
16th day of May, 1972.

Notary Public

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retained
N.Y.C. 1972
Manhattan
Building
2-3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

G. Hinton,

Plaintiff,

-against-

Conrad Schubkegel, etc., c/o Atty. F. J.
Coughlin, etc., Estate Katarina Scherer,
etc., c/o Atty. F. J. Coughlin, etc.,
Susan S. DeRose, Joseph DeRose, Patricia
DeRose, c/c Attys. Healy & Baillie, etc.,
Norman S. Ginsburg Bros., 1690-rd Av.-NYC,
Representative, Jointly, Severally,

Defendants.

Index #6315/1972

Cal. No. 85983

AFFIDAVIT

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JACK A. GREENBAUM being duly sworn, deposes and says:

1. I am associated with the firm of Healy & Baillie, attorneys for the DeRoses and Ginsburg Bros., defendants in the above captioned action, and I am familiar with the prior proceedings herein. This affidavit is made in support of the DeRoses' and Ginsburg Bros.' motion pursuant to CPLR Rule 2221 for leave to renew defendants' motions to dismiss the complaint herein.

2. By decision of Justice Francis J. Bloustein dated August 11, 1972, a copy of which is annexed hereto as Exhibit 1, Ginsburg Bros.' previous motion was "denied without prejudice to renewal upon proper papers which shall include a copy of the pleading attacked. . ." The complaints against the other defendants were dismissed by Justice Bloustein for lack of in personam jurisdiction.

3. After the issuance of Justice Bloustein's decision, and before the settlement of an order thereon, a copy of the "Complaint Supplemental Amendment" was served at the residence of Susan and Patricia DeRose by a Sheriff in California. Joseph DeRose, Jr., the adult son of Susan DeRose, does not reside with his parents and was not served. Rather than subject the

EXHIBIT 9 . "

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33a

DeRoses to further visits by uniformed sheriffs, and in the interest of judicial economy, it would appear desirable to have this entire matter disposed of at one time if possible. Therefore, the DeRoses hereby apply to renew their motion to dismiss on all the grounds heretofore stated, except lack of in personam jurisdiction, and request that their application be heard with Ginsburg's motion on the same grounds.

4. A copy of the "Complaint Supplemental Amendment" which the defendants seek to dismiss is annexed hereto as Exhibit 2. The complaint apparently alleges an action to recover rents paid over a nine year period for a "store and two room apartment". The DeRoses were the devisees of the subject property under the Will of Katarina Scherer, who died on December 20, 1965. The property was sold to Mount Sinai Hospital on or about January 4, 1969. The leasee retained possession until July 1970, when ordered by the City to vacate after a fire made the premises unsafe. The claim asserted against the DeRoses appears to be only for rent paid during the period of their ownership of the building.

5. The grounds for dismissal upon which defendants rely are: (1) the complaint fails to state a cause of action; (2) the plaintiff does not have standing or capacity to sue herein; (3) the plaintiff should be estopped from maintaining this action by reason of gross and prejudicial laches; and (4) any cause of action which might exist is barred by the running of the applicable statute of limitations.

Ginsburg asserts an additional ground for dismissal. The amended complaint alleges that Ginsburg was an agent for an undisclosed principal, "which principal to date 1972 is unknown to plaintiff" (Paragraph TWELFTH of the Complaint Supplemental Amendment.) The other allegations of the complaint of course controvert this allegation. Ginsburg was retained

by the Executor to receive rents and manage the building on behalf of the devisees. It hardly seems necessary to cite authority to the effect that an agent acting on behalf of a disclosed principal is not liable on a contract between the principal and a third party.

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

6. Plaintiff's claim appears to be based in the statutory prohibition against a landlord's action for rents where certain buildings are not possessed of certificates of occupancy. Multiple Dwelling Law §§301, 302. The building in question was erected in the year 1895, is classified as an old law tenement, and is not subject to the requirements of M.D.L. §301. There was no bar to the collection of rents under M.D.L. §302.

Even if M.D.L. §302 were applicable, that statute is in derogation of the common law in barring the collection of rents and should be and has been narrowly construed as not to create a cause of action to recover rents paid. See *Wokal v. Sequin*, 167 Misc. 463, 465, 4 N.Y.S. 2nd 86, 88 and other cases cited in the accompanying memorandum of law.

Further, if Section 302 were considered to apply and were construed to create a cause of action, the statutory limitations period of three years for actions to recover upon a liability, penalty or forfeiture created or imposed by statute, CPLR §214(2), would have expired in January 1972, barring the present action.

7. Plaintiff has also asserted that the defendants were in breach of contract in failing to keep the Church's premises in repair. Defendants contend, to the contrary, that the building was properly maintained. In fact, one of the documents produced by the plaintiff indicates the willingness of the defendants to carry out their duties and the obstructions created by the plaintiff himself. A copy of a letter dated February 18, 1966 from Ginsburg to Bishop Hinton is annexed as Exhibit 3.

- 3 -

35a

In any case, it is well settled that even if a landlord's breach amounts to a breach of covenant of quiet enjoyment, or goes so far as to constitute a failure of consideration, i.e., a constructive eviction, a tenant remains liable for the payment of rent until he actually abandons the premises.

PLAINTIFF IS WITHOUT STANDING TO SUE HEREIN

8. The store in issue was used as the place of business of The Missioner's Parent Church, Inc. and all rents were paid by the Church or on its behalf. The Church would be the only entity with standing to seek the recovery of the rents. As an incorporated body, it may only appear by an attorney, under CPLR §321(a).

Plaintiff, who apparently misunderstands the nature of the corporate entity, has denied that the Church is a corporation, maintaining that "Inc." is just a symbolic designation selected by him for his own purposes to conduct a personal enterprise. A copy of the Articles of Incorporation of the Church are annexed hereto as Exhibit 4.

THE COMPLAINT SHOULD BE DISMISSED FOR LACHES

9. The Missioner's Parent Church enjoyed the use and possession of the subject property for over nine years with full knowledge of whatever facts Mr. Hinton is relying upon in this proceeding. The Church, or Mr. Hinton, conducted operations at that site during the entire period of occupancy. In fact, plaintiff retained possession until ordered by the City to vacate after a fire made the building unsafe, a year and a half after the building was sold by the DeRoses. It is apparent that the plaintiff can show no damages consequent upon any alleged breach of duty owed him during the Church's period of possession and certainly should not be permitted to have the profitable use of the property for nine years and then be allowed to recover all or any part of the rents paid.

10. If Mr. Hinton is requesting the return of a security deposit from the DeRoses, this cause of action should be dismissed as well. All rent security was credited to the purchaser on the sale of the property in January 1969. The Church retained possession of the store until July 1970. Any claim for the return of security is against the last owner of the building and is not an obligation of the DeRoses.

WHEREFORE, it is respectfully requested that defendants' motion for leave to renew their motion to dismiss the complaint be granted and in the event that such leave is granted, that such renewal will then and there proceed, and for such other and further relief as to this Court may seem just and proper.

Jack A. Greenbaum

Jack A. Greenbaum

Sworn to before me this
11. day of October, 1972.

William F. Logquadro

WILLIAM F. LOGQUADRO
Notary Public, State of New York
No. 31-2465963
Qualified in New York County
Commission Expires March 30, 1973

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
G. HINTON, Leaseholder,
Plaintiff-Appellant,

-against-

CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.

74 - 1887

CIVIL Appeal Case File No.

73 Civ 4489 (CMM)

AFFIDAVIT OF SERVICE
BY MAIL OF
BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned deponent, being duly sworn, deposes and Says:
That he is the Plaintiff-Appellant spouse and representative herein,
is over the age of twenty-one years and resides in New York City,
New York,

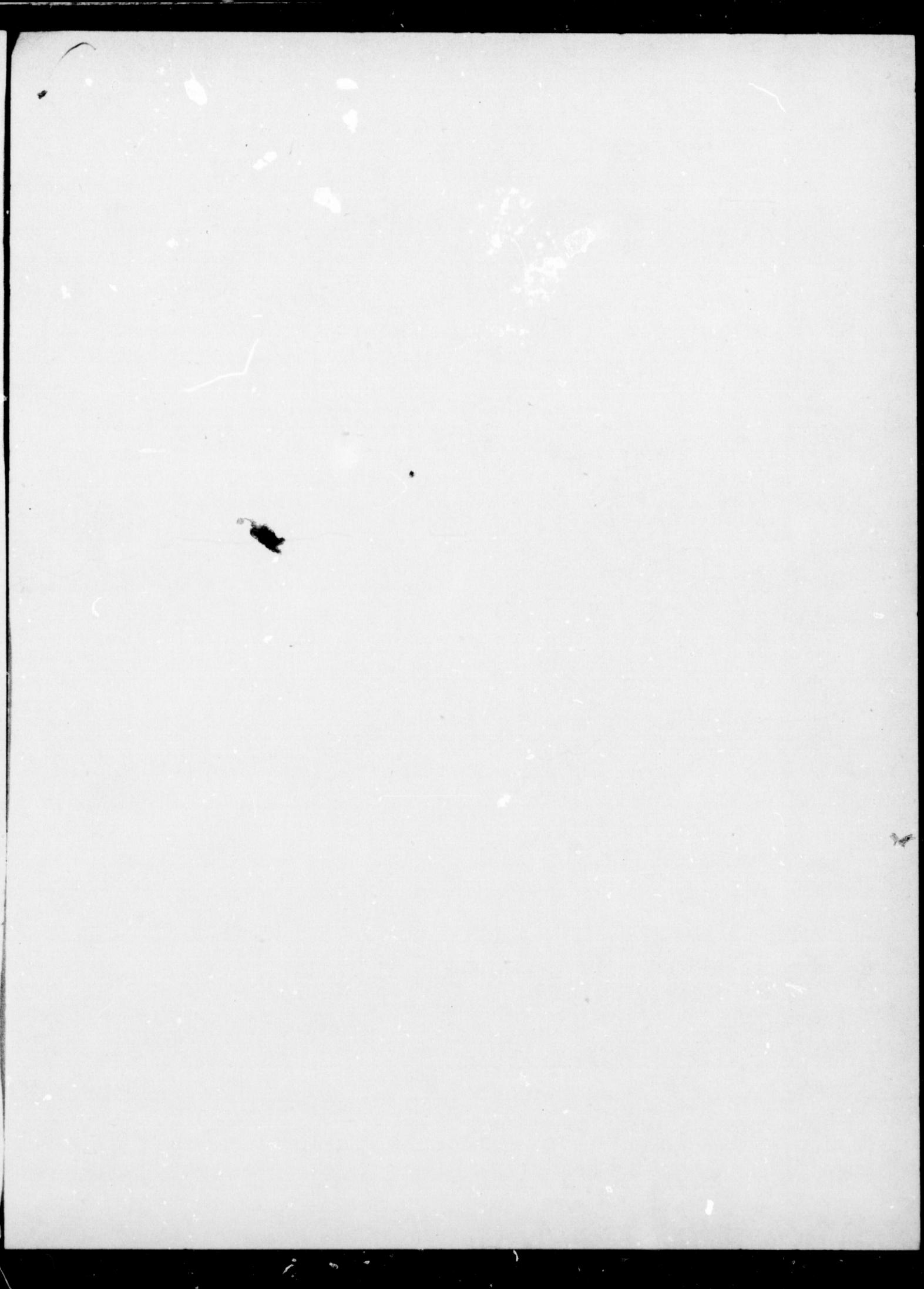
That on the 9th day of September, 1974, deponent served the
within, annexed BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT Upon
FRANCIS J. COUGHLIN, Esquire, Attorney for Conrad Schubkegel,
Individually, and Executor of Estate of Katarina Scherer, defendant-
appellee in this action, At 132 East 85th St.-M.Y.C. N.Y. 10028,
BY SPECIAL DELIVERY MAIL, the address designated by said attorney
for that purpose, By depositing Two True Copies of same enclosed in
a postpaid properly addressed wrapper, in a Post Office Official
Depository under the exclusive care and custody of the United
States Post Office Department within the City of New York, State
of New York.

Granville Hinton
GRANVILLE HINTON

Sworn to before me this 9th day of Sept.
1974.

Carl Dinnerstein

CARL DINNERSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
24-0965550
QUALIFIED IN KINGS COUNTY & N.Y. CO.
COMMISSION EXPIRES MAR. 30, 1975



STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State,

Certification
By Attorney certifies that the within

has been compared by the undersigned with the original and found to be a true and complete copy.

Attorney's
Affirmation shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

STATE OF NEW YORK, COUNTY OF

The name signed must be printed beneath

Individual
Verification

the

being duly sworn, deposes and says: deponent is
in the within action; deponent has read

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

and knows the contents thereof; the same is true to

Corporate
Verification

the
a
foregoing
corporation,

in the within action; deponent has read the

is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

Affidavit
of Service
By Mail

On 19 upon

deponent served the within

in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit
of Personal
Service

On 19 at
deponent served the within

upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the
therein.

Sworn to before me on

19

The name signed must be printed beneath

C
R
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C
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NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

19

ed,

Yours, etc.,

for

Office and Post Office Address

STICK OF SETTLEMENT

Notice that an order

is a true copy will be presented
to Hon.

of the within named Court, at

By of

M.

19

At,
Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

74-1887 6
CIVIL Appeal Case File No.

Individually Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

G. HILTON, Leaseholder,
Plaintiff-Appellant,
-against-
CONRAD SCHUMKESL, Individually,
and Executor of Estate of
Katarina Seherer,
Defendant-Appellee.

APPENDIX OF PLAINTIFF-APPELLANT

Supplemental Appendix Appendix

Attorney for

Office and Post Office Address, Telephone

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for